

REMARKS

The Final Office Action mailed June 1, 2007, and the Advisory Action mailed September 17, 2007 have been received and reviewed. Claims 1-6, 10-13 and 16-26 are pending with claims 18-22 having been withdrawn subject to an election requirement.

Claims 1-6, 10-13, 16, 17 and 23-26 stand rejected in view of cited art. Claims 1, 6, 8-10, 13, 23 and 26 are amended. Claim 27 is added. The Applicant submits that the claims are now in condition for allowance for the reasons set forth hereinafter.

Rejection Of Claims 23-26 Under 35 U.S.C. § 112, Second Paragraph

Claims 23-26 stand rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. The Examiner states that the words "non-utilitarian" and "utilitarian" used in claim 23 are indefinite because weights and prizes have utility. The rejection is overcome by amendment of claims 23 and 26 which, as amended, require the container to contain disparate products that are either food products or consumer products. Consumer products are defined in 15 U.S.C. § 2052 (Commerce and Trade) as follows:

- (a) For purposes of this chapter:
 - (1) The term "“consumer product”" means any article, or component part thereof, produced or distributed
 - (i) for sale to a consumer for use in or around a permanent or temporary household or residence, a school, in recreation, or otherwise, or
 - (ii) for the personal use, consumption or enjoyment of a consumer in or around a permanent or temporary household or residence, a school, in recreation, or otherwise; but such term does not include——
 - (A) any article which is not customarily produced or distributed for sale to, or use or consumption by, or enjoyment of, a consumer;

“Consumer product” is also defined by the Consumer Product Safety Commission as “A product designed to be used by a consumer, as compared to one designed to be used in the process of making a consumer product. The end product.” (See attached copy of definition from Google search.) Under this definition, weights inserted in a can to facilitate its vending is not a consumer product, but is merely an item used in the process of making the product. Further, by definition, a prize notification is merely a redeemable precursor to acquisition of the consumer product or end product that is usable by the consumer. The Applicant submits that the claim language is definite.

Rejection Of Claims 1-4, 6, 9-11, 13-14 And 16-17 Under 35 U.S.C. § 102(b)

Claims 1-4, 6, 9-11, 13-14 and 16-17 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Nedblake, Jr. (US 5,664,671). The Examiner states, responsive to the Applicant’s previous arguments, that Nedblake “inherently” includes an opening mechanism since it is the only way to access the sandwich located in the container. The rejection is respectfully traversed on the grounds that no language can be found in Nedblake which teaches or suggests a device that constitutes an opening mechanism as claimed. Nedblake describes that the non-beverage food-product enclosing portion (14) comprises a lower section (32) and an upper section (34) and at column 2, lines 7-12, states “[C]over 34 engages lower section 32 at joint 38 and presents upper surface 40 configured to mate with and engage base 20 as shown in FIG. 2. Lower section 32 and cover 34 cooperate to present lower container side walls 42, preferably configured to present the same diameter in cross-section as upper container side walls 18.” (Emphasis added) In other words, the cover 34 and the lower section 32 which make up the non-beverage container merely engage or register with each other and it is the human hand which provides the means for unregistering and separating the cover from the lower section to access the sandwich in the container. Again, the Applicant submits

that Nedblake does not expressly or implicitly disclose an opening mechanism or device structure associated with the container, as claimed, but merely depends on the human hand to serve as an opening mechanism at best. The Applicant asserts that Nedblake does not anticipate claims 1-4, 6, 9-11, 13-14 and 16-17. To further emphasize the distinction over Nedblake, claims 1 and 10 are amended to clarify that the top and bottom of the food-containing portion or compartment are unitarily formed with the food-containing portion to provide a sealed enclosure and that an opening mechanism provided with the container structure operates to breach the enclosure to access the interior. Again, Nedblake teaches two separated halves of a container that merely register against each other and are held together by a plastic cover, and no unitarily-formed sealed enclosure is provided.

Rejection Of Claims 1-8 Under 35 U.S.C. § 102(b)

Claims 1-8 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Feldmeier. The Examiner states, responsive to the Applicant's prior amendments and arguments, that the claims are "drawn to a vendable food product, thus the food product need only be capable of being vended" and that by the language of the claims, the "container must only be capable of being vended." The rejection is overcome by clarifying amendment of claim 1 that explicitly requires a container which is capable of being dispensed from the containerized beverage pathways of a vending machine. One of skill in the art understands that the containerized beverage pathways of a vending machine are those chutes (i.e., pathways) that enable a generally cylindrical beverage container, be that a can or bottle, to be dispensed from the interior of the vending machine to a delivery hopper where the consumer takes possession of the beverage container from the machine. It is clear to anyone of skill in the art that the square container of Feldmeier would not be capable of being dispensed from the containerized beverage pathways of a vending machine structured to vend

containerized beverages as claimed. The Applicant asserts that the combination of food products disclosed by Feldmeier are not vendable through containerized beverage pathways either. Feldmeier does not anticipate claims 1-8.

Rejection Of Claims 10-13 Under 35 U.S.C. § 102(b)

Claims 10-13 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Bezek, et al. (US 6,472,007) ("Bezek"). The Examiner asserts, responsive to the Applicant's prior arguments, that the description provided by the Applicant in the present specification concerning the definition of what may constitute a sandwich product is anticipated by the disclosure in Bezek of crackers and dip as therefore constituting a sandwich. The rejection is respectfully traversed and the Applicant respectfully asserts that Bezek does not describe or even suggest a sandwich product as defined where a filler is provided in conjunction with an outer bread or bread-like structure to contain the filler provided. Chip and dips, or crackers and dips, are understood by all not to be equivalent to sandwiches as defined by the present specification. Claims 10-13 are not anticipated.

Rejection Of Claims 23-25 Under 35 U.S.C. § 102(b) (Sayre)

Claims 23-25 stand rejected under 35 U.S.C. § 102(b) as being anticipated by Sayre (US 2,433,926). The Examiner asserts, responsive to the Applicant's previous arguments, that the container only need be vendable and must only be capable of being dispensable from the beverage pathways, and that Sayre discloses a food product and a utensil. The Applicant argues again that the claim requires at least two disparate products contained within the container. Sayre only teaches one product contained within the container, with the utensil located outside the container. Therefore, claims 23-25 are not anticipated.

Rejection Of Claims 23-25 Under 35 U.S.C. § 102(b) (Howes, et al.)

Claims 23-25 are rejected under 35 U.S.C. § 102(b) as being anticipated by Howes, et al. ("Howes"). The Examiner asserts, responsive to the Applicant's prior amendments and arguments, that Howes, et al. discloses a prize award being a non-comestible product. The rejection is overcome by amendment of claim 23 to clarify that the product-enclosing portion contains either food or consumer products which, as argued previously, are usable items unlike the hidden prize notification device taught by Howes, et al. Additionally, claim 23 is amended to clarify that the product-enclosing portion is readily accessible by the opening mechanism which distinguishes over Howes, which teaches that the secret compartment containing the prize award or notification is locked to prevent tampering and premature access to that compartment. Claims 23-25 are not anticipated.

Rejection Of Claims 5 And 7 Under 35 U.S.C. § 103

Claims 5 and 7 stand rejected under 35 U.S.C. § 103 as being unpatentable over Nedblake in view of Sanford. The Examiner states, responsive to the Applicant's prior arguments, that Nedblake discloses the invention, except for a teaching of a sandwich-like product enclosed in a wrapper and that Sanford discloses a wrapper to enclose a sandwich. The Examiner also states that Sanford "further teaches that the sandwich like product also comprises a wrapping to carry out the invention" and thus "Sanford provides the broad teaching of a container comprising two product [sic] wherein one of the products is a sandwich-like product that is wrapped." The Examiner further asserts that there would be reasonable expectation of success of using the teachings of Sanford to adapt a wrapper to the shape of the sandwich disclosed by Nedblake. The rejection is traversed. The Applicants again submit that the criteria for establishing a *prima facie* case of obviousness are not met because neither reference provides any suggestion or motivation for combining the teachings of Sanford with the Nedblake

container. The test for obviousness is what the combined teachings of the references would have suggested to one of ordinary skill in the art, and all teachings in the prior art must be considered to the extent that they are in analogous arts. MPEP § 2143.01. Nothing in Nedblake suggests enclosing the sandwich product in a wrapper since the sandwich is already in its own enclosure. Nothing in Sanford suggests wrapping a sandwich for placement in a container since the wrapper is the container. In fact, Sanford implicitly teaches away from using the wrapper with a follower device in a container as disclosed by Nedblake since it is impossible to fit the follower device into the container of Nedblake. Moreover, the explicit teaching of Sanford is to provide a packaging means for a sandwich that includes a follower or extruder sized comparably to the sandwich to facilitate extrusion of the sandwich from the package. The Examiner's suggestion that the Sanford teachings can be combined with Nedblake intentionally ignores the critical teaching of Sanford (i.e., the follower in the package) in order to make the Sanford package congruent with the Nedblake container. The teachings of cited references may not be cherry-picked in order to construct an obviousness rejection. The Applicant submits that no *prima facie* case of obviousness can be established regarding claims 5 and 7 and the claims are not obviated.

Rejection Of Claim 26 Under 35 U.S.C. § 103

Claim 26 is rejected under 35 U.S.C. § 103 as being unpatentable over Howes. The Examiner states that Howes discloses a prize, not a prize notification, and that the claim limitations are thus met. The rejection is overcome by amendment of claim 26 which clarifies that the product-enclosing portion is readily accessible by the opening mechanism. Howes is expressly directed to providing a concealed or secret compartment that contains a prize hidden and locked within so that the consumer is unaware that a prize is associated with the purchased product at the time of purchase. The locking system prevents premature access to the prize-containing compartment. Because Howes teaches that the prize-containing compartment is not readily

accessible and/or is only openable upon instructions for opening being provided to the consumer after purchase (see col. 2, lines 26-31), Howes teaches away from a readily accessible compartment or product-containing portion as claimed.

CONCLUSION

The Applicant submits that claims 1-6, 8, 9, 11-14, 16, 17 and 23-27 present patentable subject matter. Reconsideration and allowance are requested.

Respectfully submitted,



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